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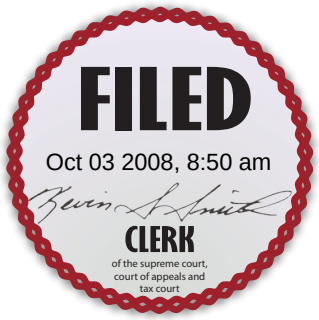

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IN THE COURT OF APPEALS OF INDIANA

ADAM SHUMPERT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0803-CR-245
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0705-FA-31

October 3, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Adam Shumpert was convicted following a jury trial of dealing in methamphetamine[1] as a Class A felony, possession of methamphetamine[2] as a Class C felony, possession of marijuana[3] as a Class D felony, possession of paraphernalia[4] as a Class A misdemeanor, and operating a vehicle while suspended[5] as a Class A misdemeanor and was sentenced to a twenty-two-year aggregate sentence. He now appeals, raising the following issues:

I. Whether the trial court abused its discretion in admitting evidence seized during Shumpert's encounter with police.

II. Whether there was sufficient evidence of Shumpert's intent to deliver methamphetamine.

We affirm.

FACTS AND PROCEDURAL HISTORY

In May 2007, Officer Charles Wallace of the Lafayette Police Department was in uniform and sitting in a marked police car when he observed a teal green Chevy Cavalier with a male driver and a female passenger. As the Cavalier passed, the driver, who was later identified as Shumpert, looked abruptly over his shoulder at Officer Wallace. This movement caught Officer Wallace's attention, and he began to follow the Cavalier. Officer Wallace observed as Shumpert pulled up to a curb and waited for a minute. Officer Wallace

[1] *See* IC 35-48-4-1.1.

[2] *See* IC 35-48-4-6.1.

[3] *See* IC 35-48-4-11(1).

[4] *See* IC 35-48-4-8.3(a).

[5] *See* IC 9-24-19-2.

passed the Cavalier and parked out of sight. Shumpert then pulled away, and Officer Wallace again began following the Cavalier into the parking lot of a bowling alley. Shumpert parked, got out of the Cavalier, and proceeded toward the entrance of the bowling alley.

Officer Wallace parked his cruiser a distance of approximately fifteen to twenty yards from the Cavalier. At trial, he testified that he did not want to give the impression that he was stopping Shumpert or impeding his ability to back out or leave. *Tr*. at 45. Officer Wallace caught Shumpert's attention by saying, "Excuse me, sir, do you mind if I speak with you?" *State's Ex.* 1 at 11. In response, Shumpert walked in the direction of Officer Wallace, and the two conversed about the Cavalier having mechanical problems. *Appellant's App.* at 29. Officer Wallace then asked Shumpert, "[D]o you have a driver's license I could take a look at?" *State's Ex.* 1 at 12. Shumpert produced an Illinois identification card. When Officer Wallace again asked for a driver's license, Shumpert responded that he did not have one. Based on this information, Officer Wallace asked Shumpert to return to the Cavalier while he returned to his patrol car to do a driver's license check.

Upon learning that Shumpert had a suspended Indiana driver's license, Officer Wallace requested a canine unit and then proceeded to write Shumpert a ticket for "Operating While Suspended." *Appellant's App.* at 29. While explaining the ticket to Shumpert, the canine unit arrived led by Officer Albert Demello.

Officer Wallace observed the canine unit walk around the Cavalier and "alert" to the area of the passenger side. *Id*. Thereafter, Officer Wallace requested and obtained Shumpert's consent to search Shumpert's person. *Id*. A pat down search uncovered a knife

in Shumpert's pocket and a plastic baggie in his sock. Officer Wallace handcuffed Shumpert and retrieved from Shumpert's sock the plastic baggie containing two smaller baggies, which were filled with an unknown substance that later testing revealed was methamphetamine. Officers Wallace and Demello searched the Cavalier and found forty grams of marijuana, flakes of methamphetamine inside a cooler, a purple velvet Crown Royal bag containing coins and rings, night goggles, a glass pipe, two sets of digital scales, four coffee filters, three lithium batteries, three pairs of pliers, and rolling papers. Also found in Shumpert's wallet was $1,070 in cash. *Tr*. at 71.

Shumpert was arrested, read his *Miranda* rights, and charged with dealing in methamphetamine, possession of methamphetamine, possession of marijuana, possession of paraphernalia, and operating a vehicle while suspended. Prior to trial, Shumpert filed a motion to suppress the evidence found in the Cavalier claiming that, since his encounter with Officer Wallace was not consensual, his stop was in violation of the Fourth Amendment. Following a hearing, the trial court entered an order denying this pretrial motion, which in pertinent part provided.

> Not every encounter between a police officer and a citizen amounts to a seizure. *Overstreet v. State*, 724 N.E.2d 661, 664 (Ind. Ct. App. 2000) . . ., *trans. denied*. When an officer asks a defendant for identification in the course of a voluntary conversation, that does not turn the encounter into an investigative stop implicating the State or Federal Constitutions. *Bentley v. State*, 846 N.E.2d 300, 306 (Ind. Ct. App. 2006), *trans. denied.* Defendant argues that unlike a request for identification, a request for a driver's license turns an encounter into an investigative stop. This court does not accept that argument. In *State v. Carlson*, 762 N.E.2d 121, 123 (Ind. Ct. App. 2002), the officer's question as to whether a driver had been drinking and the officer's question as to whether the driver would submit to a portable breath test did not turn the encounter into an investigative stop. 762 N.E.2d at 126. Here, the request to see a driver's license was just that—a request—and not an order.

> The fact that the absence of a driver's license would be incriminating no more turns the encounter into a stop than did the question in *Carlson*.

Appellant's App. at 35.

During the January 2008 trial, the State offered into evidence the contested evidence. Shumpert objected, citing the same arguments offered in his pretrial motion. The State responded to the objection by incorporating by reference its previous arguments. The trial court overruled Shumpert's objection citing to its prior ruling. Shumpert was convicted on all five counts, and he now appeals.

DISCUSSION AND DECISION

I. Admission of Evidence

Shumpert first contends that the trial court erred when it denied his pretrial motion to suppress evidence seized during his encounter with Officer Wallace. *Appellant's Br*. at 8. Shumpert acknowledges that, having proceeded to trial without seeking an interlocutory appeal on the denial of his pretrial motion, he is now challenging the admission of evidence following his conviction. *Id*. at 9. Shumpert agrees that the issue is appropriately framed as whether the trial court abused its discretion when it admitted the challenged evidence at trial. *Bentley v. State*, 846 N.E.2d 300, 304 (Ind. Ct. App. 2006), *trans. denied*. A trial court is afforded broad discretion in ruling on the admissibility of evidence, and we will reverse such a ruling only upon a showing of an abuse of discretion. *Id*. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id*.

Shumpert maintains that the evidence seized during his encounter with Officer Wallace is inadmissible under the Fourth Amendment to the United States Constitution and under Article 1, Section 11 of the Indiana Constitution because his initial detention was an unlawful stop. *Appellant's Br.* at 10, 13.

The Fourth Amendment to the United States Constitution, made applicable to the states though the Fourteenth Amendment provides, in pertinent part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend IV. As Indiana courts have previously explained, there are three levels of police investigation, only two of which implicate the Fourth Amendment. *Overstreet v. State*, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000), *trans. denied*. Under the Fourth Amendment, probable cause is required in order to arrest or subject a suspect to a long detention. *Id*. Likewise, under the Fourth Amendment, a brief investigatory stop must be supported by reasonable suspicion of criminal activity. *Id*. Nevertheless, no Fourth Amendment interest is implicated by a casual and brief inquiry of a citizen by the police. *Id*. Such a stop is referred to as a "consensual encounter." *Id*.; *see also Molino v. State*, 546 N.E.2d 1216, 1218 (Ind. 1989).

"A seizure, for example, does not occur 'simply because a police officer approaches a person, asks questions, or requests identification.'" *Manigault v. State*, 881 N.E.2d 679, 685 (Ind. Ct. App. 2008) (citing *Bentley*, 846 N.E.2d at 305); *see also Sellmer v. State*, 842 N.E.2d 358, 362 (Ind. 2006) (recognizing that person is not seized within meaning of Fourth Amendment when police officers merely approach individual and ask if individual is willing to answer questions)). "Instead, a person is seized for Fourth Amendment purposes when,

considering all the surrounding circumstances, the police conduct 'would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.'" *Bentley*, 846 N.E.2d at 305 (citing *Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) (plurality opinion)). "Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984).

Shumpert contends that Officer Wallace's request for his driver's license is analogous to the Fourth Amendment "seizure" found in *Holly v. State*, 888 N.E.2d 338 (Ind. Ct. App. 2008). In *Holly*, an officer on patrol conducted a license plate check of the car traveling in front of him and discovered that the vehicle was registered to a woman whose driver's license was suspended. *Id*. at 339. Based on this information, the officer conducted a traffic stop and, upon approaching the male driver, asked for his driver's license. *Id.* Holly did not have his license, but provided the officer with his name, date of birth, and social security number. *Id.* The officer determined that Holly's license was suspended, and that none of the passengers in the car had a valid driver's license. *Id.* The officer ordered Holly and the passengers out of the car, and another officer conducted a search of the vehicle. The search revealed a small bag of marijuana, which Holly claimed belonged to him. *Id.* Holly was convicted of possession of marijuana.

On appeal, Holly argued that the trial court abused its discretion in admitting the marijuana into evidence. Our court agreed. Knowledge that the owner of the vehicle had a

suspended license failed to give the officer reasonable suspicion of criminal activity to justify the stopping of the car to request a driver's license. As such, our court concluded that the trial court abused its discretion in admitting the evidence and reversed Holly's conviction.

Shumpert contends that like the defendant in *Holly*, "[i]t is clear that had Wallace stopped the vehicle Shumpert was in, and then asked for a driver's license, a seizure would have occurred. Wallace cannot escape this reality by waiting until an occupant exits a vehicle and *then* demanding proof of a driver's license." *Appellant's Br*. at 12 (emphasis in original). *Holly* can be distinguished. In *Holly*, the defendant was driving and was pulled over by the police. Our court analyzed whether a police officer's knowledge that the registered owner of a car had a suspended license created reasonable suspicion to support an investigatory stop, and concluded that it did not. By contrast, here, there is no suggestion that Officer Wallace knew or suspected that Shumpert was driving on a suspended license. Additionally, Officer Wallace did not stop or detain Shumpert; instead, Officer Wallace approached him in a bowling alley parking lot and asked if the two could talk.

Additionally, Shumpert's argument ignores a basic component of the consensual encounter exception to the Fourth Amendment. The United States Supreme Court has made clear, "'a seizure does not occur simply because a police officer approaches an individual and asks a few questions.'" *Cochran v. State*, 843 N.E.2d 980, 984 (Ind. Ct. App. 2006), *trans. denied* (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389 (1991)). "So long as a reasonable person would feel free 'to disregard the police and go about his business,' *California v. Hodari D.*, 499 U.S. 621, 628, 111 S. Ct. 1547, 1552, 113 L. Ed. 2d 690 (1991), the encounter is consensual and no reasonable suspicion is required."

Bostick, 499 U.S. at 434, 111 S. Ct. at 2386. "'Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment.'" *Cochran*, 843 N.E.2d at 984 (quoting *Hiibel v. Sixth Judicial Dist. Ct. of Nevada*, 542 U.S. 177, 185, 124 S. Ct. 2451, 2458, 159 L. Ed. 2d 292 (2004)). "'While most citizens will respond to a police request, and the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.'" *Id*. (quoting *Delgado*, 466 U.S. at 216, 104 S. Ct. at 1762-63).

This, however, does not mean that there are no protections for persons like Shumpert. The United States Supreme Court has recognized, if a person "refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." *Delgado*, 466 U.S. at 216-17, 104 S. Ct. at 1763; *see also Cochran*, 843 N.E.2d at 984. During his encounter with Officer Wallace, Shumpert answered questions freely and gave no indication that he was threatened in any way that required additional objective justification in order for Officer Wallace to continue his conversation with Shumpert. *See Overstreet*, 724 N.E.2d at 664 (because officer did not stop vehicle or restrict movement, and merely asked about defendant's actions, brief inquiry did not require reasonable suspicion); *see also State v. Carlson*, 762 N.E.2d 121, 126 (Ind. Ct. App. 2002) (officer's question of whether driver would mind submitting to breath test, did not transform consensual encounter into an investigative stop).

Shumpert also contends that his stop was unreasonable under Article 1, section 11 of the Indiana Constitution. The language of Article 1, section 11, tracks that of the Fourth Amendment, but our state has adopted a different form of analysis. *State v. Keller*, 845 N.E.2d 154, 169 (Ind. Ct. App. 2006) (citing *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005)). In Indiana, the validity of a search by law enforcement officers turns on an evaluation of the reasonableness of officer conduct under the totality of the circumstances. *Id*. "To assess the totality of the circumstances, we must consider 'both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizure.'" *Cade v. State*, 872 N.E.2d 186, 188 (Ind. Ct. App. 2007), *trans. denied* (quoting *Myers v. State*, 839 N.E.2d 1146, 1153 (Ind. 2005)). Some intrusions on privacy are tolerated because of citizens' concerns for safety, security, and protection, so long as they are reasonably aimed toward those concerns. *Holder v. State*, 847 N.E.2d 356, 360 (Ind. 2005).

Here, there is nothing to suggest that Officer Wallace's actions were unreasonable. After detecting what he considered to be some suspicious movement, Officer Wallace followed Shumpert for a short time to see where he was going. He did not try to pull the car over or tail it so closely as to be intimidating. When Shumpert parked, Officer Wallace approached to ask a few questions. As part of a consensual encounter, it was not unreasonable to ask Shumpert for his identification. After Shumpert volunteered that he did not have a driver's license, it was reasonable for Officer Wallace to question why Shumpert had been driving without a license. In his dealings with Shumpert, Officer Wallace's actions revealed that he was cognizant that no law had been broken and that Shumpert could not be

legally detained. We do not find Officer Wallace's actions in meeting and questioning Shumpert to rise to the level of an unreasonable invasion of Shumpert's privacy.

Finding as we do that the encounter between Officer Wallace and Shumpert was consensual and, therefore, did not violate either the State or Federal Constitution, the trial court did not abuse its discretion in admitting the evidence.

II. Sufficient Evidence of Intent to Deliver Methamphetamine

Shumpert next contends that there was insufficient evidence to convict him of possessing methamphetamine with intent to deliver. Our standard of review for sufficiency claims is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. *Williams v. State*, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007). We will consider only the evidence most favorable to the judgment together with the reasonable inferences to be drawn therefrom. *Id*.; *Robinson v. State*, 835 N.E.2d 518, 523 (Ind. Ct. App. 2005). We will affirm the conviction if sufficient probative evidence exists from which the fact finder could find the defendant guilty beyond a reasonable doubt. *Williams*, 873 N.E.2d at 147; *Robinson*, 835 N.E.2d at 523. A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt. *Richardson v. State*, 856 N.E.2d 1222, 1227 (Ind. Ct. App. 2006), *trans. denied* (2007) (citing *Maul v. State*, 731 N.E.2d 438, 439 (Ind. 2000)). This review "respects 'the jury's exclusive province to weigh conflicting evidence.'" *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005) (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)).

Shumpert contends that there was insufficient evidence of his intent to deliver the methamphetamine. A person who possesses with intent to deliver three or more grams of

methamphetamine, pure or adulterated, commits dealing in methamphetamine, a Class A felony. IC 35-48-4-1.1(a)(2)(C), (b)(1). Therefore, to convict Shumpert of possession of methamphetamine with intent to deliver as a Class A felony, the State was required to prove beyond a reasonable doubt that Shumpert possessed methamphetamine in an amount greater than three grams with intent to deliver it.

Our court has noted, "[i]ntent, being a mental state, can only be established by considering the behavior of the relevant actor, the surrounding circumstances, and the reasonable inferences to be drawn therefrom." *Richardson*, 856 N.E.2d at 1227 (citing *Davis v. State*, 791 N.E.2d 266, 270 (Ind. Ct. App. 2003), *trans. denied*). Circumstantial evidence showing possession with intent to deliver may support a conviction. *Id*. Possessing a large amount of a narcotic substance is circumstantial evidence of intent to deliver. *Id*. The more narcotics a person possesses, the stronger the inference that he intended to deliver it and not to consume it personally. *Id*. Here, Shumpert possessed over twelve grams of methamphetamine; an amount that Detective Daniel Shumaker of the Lafayette Police Department testified was inconsistent with personal use. *Tr*. at 116. Shumpert had $1,070 in cash inside his wallet. Detective Shumaker again testified that this was an unusually large amount of money for methamphetamine users who usually spend their money on methamphetamine as quickly as they can obtain it. *Id*. at 117. Detective Shumaker testified that additional evidence that one is a dealer instead of a user is the presence of digital scales. Finally, Officer Wallace testified that a Crown Royal bag "was the packaging and place of preference for people to keep their illicit drugs." *Id*. at 72.

Shumpert is asking us to substitute our own inferences for those made by the jury. This we cannot do. *Richardson*, 856 N.E.2d at 1227-28; *McHenry*, 820 N.E.2d at 127. Rather, we find that based on the amount of methamphetamine present (well over 3 grams), the presence of two digital scales and a Crown Royal bag containing change and rings and the fact that Shumpert had $1,070 in cash on his person, sufficient evidence was presented to show Shumpert's intent to deliver and to affirm Shumpert's conviction for dealing in methamphetamine.

Affirmed.

VAIDIK, J., and CRONE, J., concur.